

## NOTICES OF EMERGENCY RULEMAKING

Under the Administrative Procedure Act, an agency may determine that adoption, amendment, or repeal of a rule is necessary for immediate preservation of the public health, safety, or welfare and the notice and public participation requirements are impracticable. Under this determination, the agency may adopt the rule as an emergency and submit it to the Attorney General for review. The Attorney General approves the rule and then files it with the Secretary of State. The rule takes effect upon filing with the Secretary of State and remains in effect for 180 days. An emergency rule may be renewed for one or two 180-day periods if the requirements of A.R.S. § 41-1026 are met. If the emergency rule is not renewed or the rule is not permanently adopted by the end of the 180-day period, the emergency rule expires and the text of the rule returns to its former language, if any.

### NOTICE OF EMERGENCY RULEMAKING

#### TITLE 6. ECONOMIC SECURITY

#### CHAPTER 6. DEPARTMENT OF ECONOMIC SECURITY DEVELOPMENTAL DISABILITIES

##### PREAMBLE

1. **Sections Affected**

<u>Sections Affected</u>	<u>Rulemaking Action</u>
Article 19	New Article
R6-6-1901	New Section
R6-6-1902	New Section
R6-6-1903	New Section
R6-6-1904	New Section
R6-6-1905	New Section
R6-6-1906	New Section
R6-6-1907	New Section
R6-6-1908	New Section
R6-6-1909	New Section
R6-6-1910	New Section
R6-6-1911	New Section
2. **The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**

Authorizing statutes: A.R.S. §§ 41-1954(A)(1)(i) and (j) and (A)(13); 46-134(12); 36-552; 36-554; 36-557 and Laws 1995, Ch. 84, § 4.

Implementing statutes: A.R.S. §§ 41-1954(A)(1)(i) and (j) and (A)(13); 46-134(12); 36-552; 36-554; 36-557 and Laws 1995, Ch. 84, § 4.
3. **The effective date of the rules:**

March 12, 1996
4. **Is this rulemaking a renewal of a previous emergency rulemaking?**

Yes.

**If yes, the Register citation to previous notices of emergency rulemaking:**

1 A.A.R. 1760, October 6, 1995.
5. **The name and address of agency personnel with whom persons may communicate regarding the rule:**

Name: Vista Thompson Brown

Address: Department of Economic Security  
1789 West Jefferson, Site Code 837A  
Phoenix, Arizona 85007

or

P.O. Box 6123, Site Code 837A  
Phoenix, Arizona 85005

Telephone: (602) 542-6555

Fax: (602) 542-6000

**Arizona Administrative Register**  
**Notices of Emergency Rulemaking**

**6. An explanation of the rule, including the agency's reason for initiating the rule:**

The new Article 19, Contracts, is being proposed to implement the provisions of Laws 1994, Ch. 84, § 4 which require the Department to develop rules that describe the contract process the Department follows in circumstances where it is exempt from A.R.S. Title 41, Chapter 23 ("The Arizona Procurement Code").

The rules define the circumstances when the Division will use the exemption. In addition, the rules include the specific contracting process in each identified circumstance. These rules will provide clear direction to both the Division and to providers regarding when and how the exemption is applied.

**7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable.

**8. The summary of the economic, small business, and consumer impact:**

The rules will have a positive but intangible economic impact on small business and consumers by codifying the process the Department follows under this exemption. These rules describe the process that the Division has used for contracting under the exemption for the past 6 years.

**9. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:**

Not applicable.

**10. Incorporations by reference and their location in the rules:**

Not applicable.

**11. An explanation of the situation justifying the rule's adoption as an emergency rule:**

Emergency rules were required as part of Laws 1995, Ch. 84, § 4. The emergency situation creating the need for rules still exists as set forth in this law. The renewal will ensure that the rules do not lapse before the regular rules become final. If the rules were allowed to lapse, harm could result from confusion by providers who contract with the division. This in turn could prevent timely services to individuals with developmental disabilities.

Since the original emergency rules were filed, the Department has proceeded with the regular rulemaking process for these rules. The rules are scheduled for the April 2, 1996, Governor's Regulatory Review Council meeting.

**12. The date of the Attorney General's approval of the emergency rule:**

September 12, 1995.

**13. The full text of the rules follows:**

**TITLE 6. ECONOMIC SECURITY**

**CHAPTER 6. DEPARTMENT OF ECONOMIC SECURITY  
DEVELOPMENTAL DISABILITIES**

**ARTICLE 19. CONTRACTS**

<u>R6-6-1901.</u>	<u>Definitions</u>
<u>R6-6-1902.</u>	<u>Contracting Process</u>
<u>R6-6-1903.</u>	<u>Competitive Solicitation</u>
<u>R6-6-1904.</u>	<u>Immediate or Emergency Need for Services</u>
<u>R6-6-1905.</u>	<u>Acute Care - Solicitation of Service from Health Plans</u>
<u>R6-6-1906.</u>	<u>Acute Care - Evaluation of Contracts; Cancellation</u>
<u>R6-6-1907.</u>	<u>Acute Care - Award of Contracts</u>
<u>R6-6-1908.</u>	<u>Acute Care - Protests</u>
<u>R6-6-1909.</u>	<u>Acute Care Providers in County with No Health Plan</u>
<u>R6-6-1910.</u>	<u>Statute, Regulation, Rule, or Programmatic Change</u>
<u>R6-6-1911.</u>	<u>Procurement Records</u>

**ARTICLE 19. CONTRACTS**

**R6-6-1901. Definitions**

The following definitions apply in this Article:

1. "Contract" has the same meaning ascribed to it in A.R.S. § 41-2503(4).
2. "Procurement" has the same meaning ascribed to it in A.R.S. § 41-2503(16).
3. "Request for proposals" has the same meaning ascribed to it in A.R.S. § 41-2531(13).

**R6-6-1902. Contracting Process**

- A. The Division shall procure goods and services as prescribed in A.R.S. Title 41, Chapter 23 ("the Arizona Procurement Code") except for goods and services described in Laws 1995, Ch. 84, § 3.
- B. The Division shall procure goods and services for contracts prescribed by Laws 1995, Ch. 84, § 3, which meet 1 of the following conditions, as prescribed in this Article:
  1. The Division has issued a competitive solicitation as prescribed in A.R.S. §§ 41-2533 and 41-2534, and the solicitation has not resulted in the number of offerors needed to meet the service needs of the clients;
  2. The Division has identified an immediate or emergency service need and current providers cannot meet the need;
  3. The Division is competitively soliciting for acute care services from health plans;
  4. The Division requires acute care providers for a county in which:
    - a. No health plan has responded to competitive solicitation; or
    - b. The offeror has withdrawn from the competitive solicitation process; or
    - c. The offeror cannot reach an agreement with the Division during the competitive solicitation process; or

*Arizona Administrative Register*  
**Notices of Emergency Rulemaking**

5. A federal or state statute, regulation, rule, or programmatic change requires the Division to make changes in mandated ALTCS services, in ALTCS service delivery, or in the administration of the DD/ALTCS program.

**R6-6-1903. Competitive Solicitation**

When competitive solicitation does not result in the number of offerors required to meet the service needs of the clients, the Division shall:

1. Recruit a potential offeror by advertisement, verbal discussion, or other means to meet the service need;
2. Verify that the offeror complies with all applicable Division and AHCCCS licensing and certification requirements;
3. Establish a contract with the identified offeror;
4. Request that each provider contracting under this rule submit proposals in response to the next competitive solicitation the Division issues under A.R.S. Title 41, Chapter 23 for these services;
5. Advise each provider that failure to respond to the next competitive solicitation shall result in expiration of the existing contract; and
6. Send each provider holding a contract under this Section a notice of the next competitive solicitation for the service.

**R6-6-1904. Immediate or Emergency Need for Services**

When the Division identifies an immediate or emergency need for service and the Division cannot locate a current provider to perform the service, the Division shall follow the steps listed in R6-6-1903 to procure a contract for this service.

**R6-6-1905. Acute Care - Solicitation of Service from Health Plans**

- A. The Division shall competitively solicit proposals of acute care services. The request for proposals shall include, at a minimum, the following terms:
1. The time and date set for the proposal opening;
  2. The address of the office at which proposals are to be received;
  3. The period during which the proposal shall remain open;
  4. The service description, covered populations, geographic coverage, specifications, and a delivery or performance schedule;
  5. The contract terms and conditions, including bonding or other security requirements, if applicable;
  6. A provision for the award of contracts by category of member or service in order to secure the most financially advantageous offers for the Department;
  7. A provision that each qualified offer be entered with separate categories for the distinct groups of members or services to be covered by the proposed contracts, as set forth in the request for proposal;
  8. A provision for a procedure to request voluntary price reduction of offers from only those offerors who have been tentatively selected for award before the final award or rejection of offers;
  9. The factors to be used in the evaluation;
  10. The location and method for obtaining documents that are incorporated by reference in the Division's request for proposal;
  11. The requirement that the offeror acknowledge receipt of all amendments issued by the Division;
  12. The type of services required and a description of the work involved;
  13. The type of contract to be used and a copy of a proposed contract form or provisions;

14. The estimated length of time during which services will be required;
  15. A requirement for cost or pricing data;
  16. The minimum information that the offeror shall submit with the proposal; and
  17. A provision requiring that the offeror certify that the submission of the proposal does not involve collusion or other anti-competitive practice.
- B. The Division shall conduct discussions, as provided in the request for proposal, with responsible offerors to provide clarity and full understanding of, and responsiveness to, the request for proposals.
- C. The Division shall accord offerors fair treatment with respect to any opportunity for discussion and revision of proposals and may permit such revisions after submission and before award of the contract for the purpose of obtaining best and final offers.
- D. Prior to the award of the contract, the Division shall not disclose any information derived from proposals submitted by competing offerors.
- E. The Division may request voluntary price reduction of offers from offerors before the final award or rejection of offers.
- F. The Division may issue one or more written requests for a best and final offer to responsive offerors which shall set forth the date, time, and place for the submission of this offer. The request for a best and final offer shall inform the offerors that, if they do not submit a notice of withdrawal or a best and final offer, the Division shall construe their immediately previous offer as their best and final offer.

**R6-6-1906. Acute Care - Evaluation of Contracts; Cancellation**

- A. The Division shall base proposal evaluations on the evaluation factors set forth in the request for proposal.
- B. The Division shall send a written notice of rejection to offerors whose proposals or offers are rejected and maintain a copy of the notice in the procurement file.
- C. The Assistant Director may cancel a request for proposal or may reject any and all proposals in whole or in part if the Assistant Director determines that the cancellation or rejection is in the Department's best interest based on the following factors:
1. The availability of funding;
  2. The inability to come to agreement with offerors;
  3. A change in the need for services;
  4. The potential for loss of federal funds;
  5. A change in federal or state requirements which affect the service specified in the proposal, and
  6. Collusion or anti-competitive practice on the part of the offeror.
- D. The Division shall document the reasons for the action in the procurement file.

**R6-6-1907. Acute Care - Award of Contracts**

- A. The Division shall award a contract:
1. To the responsible and responsive offeror with the offer most advantageous to the Department based on the evaluation factors set forth in the request for proposal; and
  2. By either the category of members or the category of service, whichever is most financially advantageous to the Department.
- B. The Division may award contracts to more than 1 offeror for each county in the state for the purpose of limiting the number of high-risk clients who may be included in each contract.
- C. The Division shall not award a contract to any program contractor that will cause the Department to lose any federal monies to which it is otherwise entitled.

*Arizona Administrative Register*  
**Notices of Emergency Rulemaking**

- D. The Division shall document the reasons for the award in the procurement file.

**R6-6-1908. Acute Care - Protests**

- A. The Assistant Director shall resolve any protest filed concerning a contract proposal or award.
- B. An actual offeror may protest a contract proposal or award.
- C. A protester shall file a written protest with the Assistant Director. The protest shall include the following information:
1. Name, address, and telephone number of the protester;
  2. Signature of the protester or its representative;
  3. Identification of the request for proposals or contract number;
  4. A statement of the legal and factual grounds of the protest including copies of any relevant documents; and
  5. The relief requested.
- D. The protester shall:
1. File the protest prior to the closing date for receipt of initial proposals if the protest relates to a request for proposals; and
  2. File the protest within 10 working days after a contract award has been made public if the protest relates to the award of a contract.
- E. A protest is deemed filed when the written document is received by the Division.
- F. If a protest is filed before the award of a contract, the Division may award a contract unless the Assistant Director makes a written determination that there is reasonable probability the protest will be sustained and that the stay of award of the contract is consistent with the best interests of the Department.
- G. Within 14 work days of the filing date of a protest, the Assistant Director shall send a written decision to the protester by certified mail, return receipt requested, or by any other method, that provides evidence of receipt. The decision shall explain the reasons for the decision.
- H. If the Assistant Director sustains the protest in whole or in part, and determines that the request for proposal, proposed contract award, or contract award does not comply with applicable statutes and rules, the Assistant Director shall implement an appropriate remedy as prescribed in subsection (J).
- I. In determining an appropriate remedy, the Assistant Director shall consider the following:

1. Circumstances surrounding the procurement or proposed procurement,
  2. The seriousness of the procurement deficiency,
  3. The degree of prejudice to other interested parties,
  4. The degree of prejudice to the integrity of the procurement system,
  5. The good faith of the parties,
  6. The extent of the performance,
  7. The costs to the Department,
  8. The urgency of the procurement, and
  9. The impact of the relief on the Department's mission.
- J. The following actions, alone or in combination, shall serve as an appropriate remedy:
1. Decline to exercise an option to renew under the contract,
  2. Terminate the contract,
  3. Reissue the request for proposal,
  4. Issue a new request for proposals, or
  5. Award a contract as provided in these procurement rules.

**R6-6-1909. Acute Care Providers in County with no Health Plan**

When the Division does not obtain a response, an offeror withdraws from a competitive solicitation, or the Division cannot reach an agreement to contract with a health plan during competitive solicitation, the Division shall recruit individual providers for acute care services by following R6-6-1903(1), (2), and (3).

**R6-6-1910. Statute, Regulation, Rule, or Programmatic Change**

When a new federal or state statute, regulation, rule, or programmatic change involving the DD/ALTCS program or administration requires the Division to comply by modifying current programs, the Division shall follow the steps in R-6-1903(1), (2), and (3).

**R6-6-1911. Procurement Records**

The Division shall maintain the following records relating to the procurement of contracts in the procurement file, if applicable:

1. A copy of the request for proposal,
2. The offers received,
3. The best and final offers,
4. Written correspondence,
5. The basis for award, and
6. The documentation required by R6-6-1906(D) and R6-6-1907(D).